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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 LISA H.,

10 Plaintiff,

11 CASE NO. C19-0031-MAT

12 v.

13 ANDREW M. SAUL,
14 Commissioner of Social Security,¹

15 Defendant.

16 ORDER RE: SOCIAL SECURITY
17 DISABILITY APPEAL

18 Plaintiff proceeds through counsel in her appeal of a final decision of the Commissioner of
19 the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's
20 application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law
21 Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all
22 memoranda of record, this matter is AFFIRMED.

23 **FACTS AND PROCEDURAL HISTORY**

24 Plaintiff was born on XXXX, 1959.² She has an 11th-grade education, and has worked as

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¹ Andrew M. Saul is now the Commissioner of the Social Security Administration. Pursuant to Federal Rule
27 of Civil Procedure 25(d), Andrew M. Saul is substituted for Nancy A. Berryhill as defendant in this suit.

28 ²Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 a restaurant server and banquet server. (AR 46, 57-58.)

2 Plaintiff applied for DIB in March 2015. (AR 70, 135-36.) That application was denied
3 and Plaintiff timely requested a hearing. (AR 89-91, 93-98.)

4 On November 27, 2017, ALJ Ilene Sloan held a hearing, taking testimony from Plaintiff
5 and a vocational expert. (AR 25-69.) On February 15, 2018, the ALJ issued a decision finding
6 Plaintiff not disabled. (AR 11-19.) Plaintiff timely appealed. The Appeals Council denied
7 Plaintiff's request for review on November 16, 2018 (AR 1-5), making the ALJ's decision the final
8 decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this
9 Court.

10 **JURISDICTION**

11 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
15 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
16 engaged in substantial gainful activity between her alleged onset and date last insured (DLI). (AR
17 13.) At step two, it must be determined whether a claimant suffers from a severe impairment. The
18 ALJ found that through the DLI, Plaintiff's obesity, status post cervical spine fusion with stenosis,
19 early acquired scoliosis, and degenerative disc disease with facet arthropathy was severe. (AR
20 14.) Step three asks whether a claimant's impairments meet or equal a listed impairment. The
21 ALJ found that Plaintiff's impairments did not meet or equal the criteria of a listed impairment.
22 (AR 14-15.)

23 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess

1 residual functional capacity (RFC) and determine at step four whether the claimant has
2 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of
3 performing light work, with additional limitations: she can frequently climb ramps and stairs and
4 occasionally climb ladders, ropes, and scaffolds. She can frequently balance. She can occasionally
5 stoop, kneel, crouch, and crawl. (AR 15.) With that assessment, the ALJ found Plaintiff able to
6 perform past relevant work as a waitress and caterer's helper. (AR 18.)

7 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to
8 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
9 adjustment to work that exists in significant levels in the national economy. Because the ALJ
10 found Plaintiff capable of performing past relevant work, the ALJ did not proceed to step five.
11 (AR 18-19.)

12 This Court's review of the ALJ's decision is limited to whether the decision is in
13 accordance with the law and the findings supported by substantial evidence in the record as a
14 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
15 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
16 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
17 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
18 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
19 2002).

20 Plaintiff argues the ALJ erred in (1) discounting her subjective symptom testimony, (2)
21 discounting her husband's letter, and (3) discounting her treating doctor's opinions. The
22 Commissioner argues that the ALJ's decision is supported by substantial evidence and should be
23 affirmed.

Subjective symptom testimony

The ALJ discounted Plaintiff's testimony for a number of reasons: (1) the objective evidence did not corroborate Plaintiff's allegations of disabling limitations; (2) her activities were inconsistent with her allegation of disability; (3) Plaintiff stopped working for reasons unrelated to her impairments, and her condition had not deteriorated since she was laid off; and (4) Plaintiff's receipt of unemployment benefits contradicted her allegation that she is disabled.³ (AR 16-17.) Plaintiff argues that these reasons are not clear and convincing, as required in the Ninth Circuit.

9 Plaintiff objects to the ALJ’s first reason on the grounds that an ALJ is not a doctor, and
10 thus is not qualified to consider whether the objective medical evidence corroborates her
11 allegations. Dkt. 8 at 5. This argument is inconsistent with the agency’s regulatory scheme and
12 guidance, which instructs the ALJ to consider whether a claimant’s testimony is consistent with
13 the medical record. *See, e.g.*, 20 C.F.R. § 404.1529; Social Security Ruling (SSR) 16-3p, 2017
14 WL 5180304, at *5 (Oct. 25, 2017) (“A report of minimal or negative findings or inconsistencies
15 in the objective medical evidence is one of the many factors we must consider in evaluating the
16 intensity, persistence, and limiting effects of an individual’s symptoms.”). Although Plaintiff
17 emphasizes in her briefing (Dkt. 8 at 6) that she underwent surgeries for her medical conditions,
18 the ALJ acknowledged as much (AR 16) and the fact that Plaintiff had surgeries in the past does
19 not necessarily suggest that her condition remained at the same level that required surgical
20 intervention. Plaintiff has not shown that the ALJ erred in considering whether Plaintiff’s

³ The Commissioner does not defend the ALJ's reasoning with regard to unemployment benefits. Dkt. 10. Assuming this line of reasoning was erroneous, it is nonetheless harmless in light of the other valid reasons the ALJ provided. See *Carmickle v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008).

1 allegations of disabling impairments were consistent with the normal and mild findings in the
2 record, along with other factors.

3 The ALJ also properly considered Plaintiff's work history in assessing her allegations. The
4 ALJ noted that Plaintiff reported to providers that she stopped working after being laid off
5 following a change of management. (AR 17 (citing AR 379, 421).) This explanation for the end
6 of her employment does not suggest that Plaintiff's impairments are the primary reason why she
7 cannot work, which undermines her disability claim. *See SSR 82-61*, 1982 WL 31387, at *1 (Jan.
8 1, 1982) ("A basic program principle is that a claimant's impairment must be the primary reason
9 for his or her inability to engage in substantial gainful work."). Plaintiff argues that the ALJ's
10 findings in this regard are not supported by substantial evidence (Dkt. 8 at 6-7), but does not
11 explain why her reports of layoff due to a change in management are not sufficient to support the
12 ALJ's finding. Plaintiff emphasizes her hearing testimony regarding her difficulty performing her
13 job (Dkt. 11 at 3 (citing AR 47-51)), but cites no authority requiring an ALJ to credit statements
14 made at the hearing over statements made at other times. Plaintiff's inconsistent statements
15 regarding the reason why she stopped working support the ALJ's conclusion. *See Bruton v.*
16 *Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (holding that the ALJ did not err in discounting
17 claimant's testimony based on his report that he stopped working because he was laid off rather
18 than because he was injured).

19 Finally, the ALJ discounted Plaintiff's description of disabling impairments in light of
20 evidence she was able to engage in activities inconsistent with those allegations. (AR 16-17.) The
21 ALJ cited Plaintiff's ability to *inter alia* act as the "predominant caregiver" for her young grandson
22 on a full-time basis as well as volunteer at a food bank. (AR 16.) This finding is supported by
23 substantial evidence. (*See* AR 296 ("She is able to care for her 2 year old grandson. This brings

1 her joy to be around him and babysit.”), 322 (“She continues to care for [grandson] every day and
2 enjoys spending time with him.”), 347 (“She continues to watch her grandchildren every day and
3 says they are a source of great inspiration for her to continue with her taper.”), 356 (“[Plaintiff] is
4 predominant caregiver for grandchild”), 371 (“She is a full-time day care provider for grandchild,
5 something she very much enjoys.”), 379 (“[Plaintiff] has been spending considerable time [] baby-
6 sitting.”), 384 (same), 398 (same), 405 (Plaintiff caring for seven-week-old grandson), 412
7 (Plaintiff “spending considerable time [] baby-sitting”), 454 (listing “childcare activities
8 (grandmother [] role”), 459 (Plaintiff is able to care for her 2-year-old grandson), 464 (same), 551
9 (Plaintiff has high “life role function” as “caring for her grandchildren”), 559 (Plaintiff “has done
10 some volunteering at food bank”), 572 (Plaintiff “volunteering for Good Neighbors Ass’n
11 (distributing food to individuals and institutions”).)

12 Although Plaintiff argues that the ALJ merely assumed that her childcare and volunteer
13 activities were inconsistent with her disability allegation, this inference is reasonable in light of
14 the discrepancy between the nature of the activities and the extreme limitations she alleged. Dkt.
15 8 at 9-10. For example, Plaintiff alleged that she could not lift anything heavier than a cup of
16 coffee (AR 226), yet she brought her grandson to two of her own medical appointments (when he
17 was an infant and toddler) and told her doctors she took care of him every day. (*See, e.g.*, AR 322,
18 379.) During the same appointment where Plaintiff reported volunteering at a food bank, she also
19 told her doctor that she was “feeling better and functioning well[,]” and thus wanted to maintain
20 her current pain medication regimen. (AR 572.) Even without seeking additional clarification
21 about Plaintiff’s activities, the ALJ reasonably interpreted her childcare and volunteer activities to
22 be inconsistent with her allegation of disability. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
23 2007) (activities may undermine credibility where they (1) contradict the claimant’s testimony or

1 (2) “meet the threshold for transferable work skills”). Although Plaintiff attempted to minimize
2 her childcare responsibilities at the administrative hearing (AR 53), the ALJ did not err in relying
3 on the multitude of statements she made to providers describing her childcare role as more
4 expansive. (See AR 296, 322, 347, 356, 371, 379, 384, 398, 405, 412, 454, 459, 464, 551.)

5 Because the ALJ provided multiple clear and convincing reasons to discount Plaintiff's
6 allegations, the ALJ's assessment is affirmed.

Lay statement

8 Plaintiff's husband, Scott Lane, wrote a letter describing his wife's symptoms and
9 limitations. (AR 261-62.) The ALJ summarized Mr. Lane's statement and stated that she gave it
10 little weight because the record showed that Plaintiff's condition had remained stable since the
11 time she had last worked, and that she had stopped working for reasons unrelated to her
12 impairments. (AR 18.)

13 Plaintiff contends that this reasoning is not germane, as is required in the Ninth Circuit.
14 See *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993) (“If the ALJ wishes to discount the
15 testimony of the lay witnesses, he must give reasons that are germane to each witness.”).
16 Specifically, Plaintiff argues that the record does not support the ALJ’s reasoning, but instead
17 supports Mr. Lane’s statement that Plaintiff “worked as long as she could despite severe back pain
18 until she simply no longer could do so.” Dkt. 8 at 13.

19 As discussed above, the record shows that Plaintiff reported to her providers at the time
20 that she stopped working because she was laid off due to a change in management. (*See* AR 379,
21 421.) The record also corroborates the ALJ's finding that Plaintiff's symptoms had remained
22 stable since before she stopped working. (*See, e.g.*, AR 315 (July 2014 report that Plaintiff's
23 symptoms had been stable for the past four years), 339 (January 2014 note describing improvement

1 in Plaintiff's symptoms and functioning since 2013).) Although Plaintiff focuses on her own
2 testimony that contradicts her reports to her doctors about why she stopped working, as explained
3 above, the ALJ did not err in discounting Plaintiff's hearing testimony. Thus, the ALJ did not err
4 in characterizing Mr. Lane's statement as inconsistent with the record, or in discounting it on that
5 basis. *See Lewis v. Apfel*, 236 F.3d 503, 511-12 (9th Cir. 2001) (germane reasons for discounting
6 lay testimony included inconsistency with medical evidence, evidence of claimant's activities, and
7 claimant's reports).

Medical evidence

9 Plaintiff's treating doctor David Tauben, M.D., submitted two statements in support of her
10 disability claim. (AR 591-98.) The ALJ summarized Dr. Tauben's findings and explained why
11 she gave them little weight:

12 Dr. Tauben indicated that the claimant could not lift or carry any weight. He opined
13 that the claimant could only stand or sit for 15 minutes before needing to change
14 position. Dr. Tauben indicated that the claimant could lift less than five pounds.
15 He opined that the claimant was permanently disabled. The limitations opined by
16 Dr. Tauben are rather extreme, and are more restrictive than the limitations alleged
17 by the claimant. His lifting limitation is inconsistent with the claimant's ability to
18 hold and carry her grandchild, diaper, feed, place him in a carseat, lift the car seat
19 out of the car, push him in a stroller, and take care of all of his needs from when he
20 was an infant until he was three-years-old ([AR 53, 296, 347, 371, 379, 483, 551]).
Moreover, Dr. Tauben's statements are inconsistent with the objective findings on
examination. The claimant has had no neurological deficits, her gait is normal,
sensation, reflexes, and strength have consistently been normal ([AR 348, 514,
530]). It is also inconsistent with no findings of atrophy on examination. The
determination of disability is a decision reserved to the Commissioner, and Dr.
Tauben's opinion that the claimant is permanently disabled infringes on this issue.
His opinion is also inconsistent with her reported activities and imaging, which
showed no acute process ([AR 449]). For these reasons, Dr. Tauben's opinion is
given little weight.

(AR 17-18.) Plaintiff contends that the ALJ erred in speculating as to her childcare activities, and erred in finding Dr. Tauben's opinion to be inconsistent with the medical evidence because Dr.

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1 Tauben is a pain specialist and described her pain to be reasonable in light of the objective
2 evidence. Dkt. 8 at 14.

3 In general, more weight should be given to the opinion of a treating physician than to a
4 non-treating physician, and more weight to the opinion of an examining physician than to a non-
5 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted
6 by another physician, a treating or examining physician's opinion may be rejected only for ““clear
7 and convincing”” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
8 Where contradicted, a treating or examining physician's opinion may not be rejected without
9 ““specific and legitimate reasons’ supported by substantial evidence in the record for so doing.””
10 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

11 The Court finds that the ALJ’s reasoning with respect to Dr. Tauben’s opinions is specific
12 and legitimate. As explained *supra*, the Court finds the ALJ’s inferences regarding Plaintiff’s
13 childcare activities to be reasonable in light of the evidence in the record showing that Plaintiff
14 cared for her grandson on a full-time basis and even occasionally brought him with her to medical
15 appointments: the physical requirements of this activity is inconsistent with the limitations
16 described by Dr. Tauben, particularly the lifting/carrying restrictions. (*See* AR 593, 598.) It is
17 reasonable to find Dr. Tauben’s opinions that Plaintiff can lift no weight to be inconsistent with
18 her ability to care for her grandson while he was an infant and toddler, and to discount his opinions
19 on that basis. *See Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (affirming an ALJ’s
20 rejection of a treating physician’s opinion that was inconsistent with the claimant’s level of
21 activity).

22 Furthermore, the ALJ’s reference to evidence that Plaintiff maintained a normal gait, full
23 extremity strength, and had no atrophy also contradicts Dr. Tauben’s opinion that Plaintiff was

1 extremely limited in her ability to lift/carry, sit, or stand. *See* AR 281, 348, 379, 426, 514. This
2 is another valid reason to discount Dr. Tauben's opinions. *See Tommasetti v. Astrue*, 533 F.3d
3 1035, 1041 (9th Cir. 2008) (not improper to reject an opinion presenting inconsistencies between
4 the opinion and the medical record).

5 Because the ALJ provided specific, legitimate reasons to discount Dr. Tauben's opinions,
6 the ALJ's assessment of those opinions is affirmed.

7 **CONCLUSION**

8 For the reasons set forth above, this matter is AFFIRMED.

9 DATED this 5th day of August, 2019.

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12 Mary Alice Theiler
13 United States Magistrate Judge
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